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Supreme Court, U.S.
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No. 93-1790

In The

Supreme Court of The United States

October Term, 1993

JOHN BELSITO,

Petitioner,

vs.

THE PEOPLE OF THE STATE OF NEW YORK,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE APPELLATE TERM OF THE NEW YORK STATE SUPREME COURT, 9TH AND 10TH JUDICIAL DISTRICTS

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether Petitioner had fair notice of the driving-while-intoxicated charge for which he was convicted, as required by the due process and notice provisions of the Fifth, Sixth, and Fourteenth Amendments to the United States Constitution, where it was well-established in the state, by statute and case law, that a person may be convicted of that offense when charged with a related offense that prohibits the operation of a motor vehicle by a person with a specific blood-alcohol content.

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PRELIMINARY STATEMENT

Respondent requests that this Court deny John Belsito's (hereinafter "defendant") petition for a writ of certiorari seeking review of an order of the Appellate Term of the Supreme Court of the State of New York, 9th and 10th Judicial Districts, which affirmed his judgment of conviction for operating a motor vehicle while under the influence of alcohol or drugs (New York Vehicle and Traffic Law § 1192[3]) ("common law intoxication"), unlicensed operation of a motor vehicle (New York Vehicle and Traffic Law § 509[1]), and speeding (New York Vehicle and Traffic Law § 1180[b]).

OPINIONS BELOW

Defendant's judgment of conviction was affirmed by the Appellate Term of the Supreme Court of the State of New York, 9th and 10th Judicial Districts. The decision and order of that court are unreported, but are reproduced in defendant's petition at pp. A4-A7. The New York Court of Appeals denied defendant's application for leave to appeal to that court. *People v. Belsito*, 82 N.Y.2d 891, 632 N.E.2d 468 (1993).[1]

JURISDICTIONAL STATEMENT

This Court has jurisdiction of the petition pursuant to

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[1] The cover of defendant's petition states erroneously that it is a petition for a writ of certiorari to the United States Court of Appeals for the Second Circuit. This case was never heard by the Second Circuit or any other federal court.

28 U.S.C. § 1257(3), but the petition is untimely. The decision of the Appellate Term of the Supreme Court of the State of New York, 9th and 10th Judicial Districts, affirming defendant's judgment of conviction, was entered on November 3, 1993. The order of the New York Court of Appeals, denying defendant's application for leave to appeal to that court was entered on December 14, 1993. Defendant's petition for certiorari was filed on March 16, 1994, ninety-two days after his application for leave to appeal to the New York Court of Appeals was denied.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

United States Constitution, Amendment V

"No person shall be . . . deprived of life, liberty, or property, without due process of law . . . ."

United States Constitution, Amendment VI

"In all criminal prosecutions the accused shall enjoy the right . . . to be informed of the nature and cause of the accusation . . . ."

United States Constitution, Amendment XIV

"No State shall . . . deprive any person of life, liberty, or property, without due process of law . . . ."

New York Vehicle and Traffic Law § 1192(1)

"Driving while ability impaired. No person shall operate a motor vehicle while the person's ability to operate such motor vehicle is impaired by the consumption of alcohol."

New York Vehicle and Traffic Law § 1192(2)

"Driving while intoxicated; per se. No person shall operate a motor vehicle while such person has .10 of one per centum or more by weight of alcohol in the person's blood . . . ."

New York Vehicle and Traffic Law § 1192(3)

"Driving while intoxicated. No person shall operate a motor vehicle while in an intoxicated condition."

New York Vehicle and Traffic Law § 1192(7) (now designated section 1192[9])

"Conviction of a different charge. A driver may be convicted of a violation of subdivision one, two or three of this section, notwithstanding that the charge laid before the court alleged a violation of subdivision two or three of this section, and regardless of whether or not such conviction is based on a plea of guilty."

STATEMENT OF THE CASE

Introduction

On December 9, 1990, at approximately 2:30 a.m., defendant was travelling westbound on the Long Island Expressway; he was driving eighty-five miles per hour and weaving between lanes. After he was stopped by the police, he was unable to produce a driver's license. Defendant's eyes were bloodshot, his speech was slurred, his breath smelled of alcohol, he staggered when he walked, and he failed two field sobriety tests. Subsequent breathalyzer testing revealed that he had .12 of one percent of alcohol in his blood. For his acts, defendant was charged with

operating a motor vehicle while under the influence of alcohol or drugs (New York Vehicle and Traffic Law § 1192[2]) (operating a motor vehicle with a blood-alcohol level of .10 of one percent or more), speeding (New York Vehicle and Traffic Law § 1180[b]), failure to signal (New York Vehicle and Traffic Law § 1163[a]), unsafe lane change (New York Vehicle and Traffic Law § 1128[a]), and unlicensed operation of a motor vehicle (New York Vehicle and Traffic Law § 509[1]).

The Trial

The People's Case

On December 9, 1990, Nassau County Police Officer GREGORY CELENTANO, of the Highway Patrol Bureau, was assigned to patrol the Long Island Expressway between exits 40 and 48. At 2:30 a.m., he was on the westbound shoulder of the expressway, between exits 40 and 41, when he observed the defendant travelling west in a black pick-up truck at a high rate of speed. Celentano estimated defendant's speed at eighty-five miles per hour and then confirmed it with his radar equipment. As defendant's vehicle passed, Celentano observed that it was straddling the line between the right and center lanes. It then weaved toward the left lane (Celentano: 73-88).[2] Celentano followed defendant's vehicle and radioed its direction. Defendant increased his speed to between ninety and ninety-five miles per hour and

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[2] Unless otherwise specified, numbers in parentheses refer to pages in the trial transcript. Numbers preceded by the letter "S" refer to pages in the sentencing minutes. The names preceding the page numbers refer to the witnesses whose testimony is recounted.

weaved into the right lane, forcing another vehicle to swerve out of his way. Defendant then weaved back into the left lane, causing another vehicle to brake hard. Celentano waited approximately three-quarters of a mile before turning on his emergency lights so that he could stop defendant in a lighted portion of the expressway (Celentano: 88-90, 129).

Police Officer ROBERT SCUDERI was patrolling the eastbound side of the expressway at exit 37 when he heard over the radio that Celentano was following the defendant. Scuderi made a U-turn at exit 38 and waited for the defendant to approach. Moments later, the defendant and Celentano passed by. Scuderi observed that defendant's vehicle was straddling the left and center lanes and travelling approximately eighty-five miles per hour. Defendant's vehicle was stopped approximately one and one-half miles further down the road, between exits 36 and 37 (Scuderi: 162-68).

Celentano walked up to defendant's vehicle on the driver's side, and Scuderi approached from the opposite side. In addition to the defendant, a female passenger was seated in the vehicle. Defendant could not produce a driver's license, and Celentano smelled alcohol on his breath. After Celentano asked defendant to exit the vehicle, he noticed that the defendant held onto the truck to maintain his balance. Celentano and Scuderi further observed that the defendant staggered and swayed as he walked, had bloodshot eyes, and had slurred speech. Defendant was given two field sobriety tests: the "Alphabet Romberg" test and the "one legged stand" test. Defendant failed them both. Based on his erratic driving, the odor of alcohol on his breath, his bloodshot eyes, his stagger, and his poor performance on the field sobriety tests, Celentano and Scuderi concluded that defendant was intoxicated (Celentano: 90-94, 103-04; Scuderi: 171-77).

Defendant was arrested and transported to the Central Testing Unit of the Nassau County Police Department. Defendant initially refused to submit to a breathalyzer test, but, after making a phone call, agreed to take the test (Celentano: 96-102). Police Officer DONALD ROBBERT, a certified breathalyzer technician, administered two tests to defendant: the first at 3:45 a.m., and the second at 3:52 a.m. Both tests revealed that the blood-alcohol content of defendant's blood was .12 percent (Robbert: 211-19, 247-50). Robert then asked defendant to perform a series of agility tests. Defendant attempted the tests, but was unable to perform them satisfactorily. During the balance test, defendant exhibited a four-inch sway and was unable to stand still. During the "finger to nose" test, defendant was unable to touch his finger to the tip of his nose on four of six attempts. Robbert further detected that defendant had alcohol on his breath, slurred his speech, and staggered when he walked. Robbert concluded that defendant was "obvious[ly]" intoxicated (Robbert: 253-56, 259).

The Defendant's Case

The defendant, JOHN BELSITO, and his friend, DEBORAH COX, admitted that defendant consumed three or four beers between 1:15 and 1:30 a.m. They acknowledged that defendant was speeding before he was stopped by the police, but they denied that he was driving erratically and that his speech was slurred (Cox 360-62, 371; Belsito: 374-76).

The Verdict and Sentence

Pursuant to former New York Vehicle and Traffic

Law § 1192(7), [3] the court submitted to the jury for its consideration New York Vehicle and Traffic Law § 1192(3) ("common law intoxication"), as well as New York Vehicle and Traffic Law § 1192(2) (operating a motor vehicle with a blood-alcohol level of .10 percent or more) and the other charges in the information.[4] Following its deliberations, the jury found defendant guilty of operating a motor vehicle while under the influence of alcohol or drugs (New York Vehicle and Traffic Law § 1192[3]) ("common law intoxication"), speeding (New York Vehicle and Traffic Law § 1180[b]), and unlicensed operation of a motor vehicle (New York Vehicle and Traffic Law § 509[1]). Defendant was found not guilty of the remaining charges that the jury considered (506-07). On March 13, 1992, defendant was sentenced to three years' probation and ordered to pay five

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[3]

At the time of defendant's trial, New York Vehicle and Traffic Law § 1192(7) provided: "Conviction of a different charge. A driver may be convicted of a violation of subdivision one, two or three of this section, notwithstanding that the charge laid before the court alleged a violation of subdivision two or three of this section, and regardless of whether or not such conviction is based on a plea of guilty." 1988 N.Y. Laws ch. 47, § 18, amended by 1990 N.Y. Laws ch. 173, § 62 (redesignating subd. 7 of Vehicle and Traffic Law § 1192 as subd. 9).

[4]

The court also submitted New York Vehicle and Traffic Law § 1192(1) (driving while ability impaired). The jury was instructed, however, to consider that charge only if it did not find the defendant guilty under either New York Vehicle and Traffic Law § 1192(2) or § 1192(3) (446).

hundred dollars in fines (S. 6-7).

The State Court Appeals

On appeal to the Appellate Term of the New York Supreme Court, 9th and 10th Judicial Districts, defendant argued that he was not given adequate notice that he faced conviction under New York Vehicle and Traffic Law § 1192(3), notwithstanding the existence of former section 1192(7), which he assailed as unconstitutional.

On November 3, 1993, the Appellate Term unanimously affirmed defendant's conviction. Relying on *People v. Farmer*, 36 N.Y.2d 386, 330 N.E.2d 22 (1975) and *People v. Fielder*, 78 Misc. 2d 7, 358 N.Y.S.2d 263 (Sup. Ct. App. Term 9th & 10th Jud. Dists. 1974), the court held that New York Vehicle and Traffic Law § 1192(7), which had since been redesignated New York Vehicle and Traffic Law § 1192(9), is constitutional and that defendant had sufficient notice of the charges against him. On December 14, 1993, defendant's application for leave to appeal to the New York Court of Appeals was denied. *People v. Belsito*, 82 N.Y.2d 891, 632 N.E.2d 468 (1993) (Smith, J.).

REASONS FOR DENYING THE WRIT

Defendant's petition for a writ of certiorari should be denied for two reasons. First, the petition is untimely, and defendant has not offered any explanation for his failure to comply with Rules 13.1 and 29.2 of the Rules of this Court, nor presented this Court with any compelling reason for excusing his tardiness. *See* R. Stern & E. Gressman, *Supreme Court Practice* 389 (5th ed. 1978). Second, there are no "special and important" reasons for granting review in this case. Rules of the Supreme Court, Rule 10.

Defendant's claim is completely meritless, and does not present any novel or unsettled legal issue deserving of this Court's review.

I. DEFENDANT'S PETITION IS UNTIMELY AND SHOULD NOT BE REVIEWED BY THIS COURT.

The rules of this Court require that a petition for a writ of certiorari seeking review of a judgment of a lower state court be filed with the Clerk within ninety days after the state court of last resort has entered an order denying discretionary review. Rules of the Supreme Court, Rule 13.1. Defendant's petition is untimely because it was filed with the Clerk of this Court ninety-two days after the New York Court of Appeals entered its order denying defendant's application for leave to appeal.

Defendant's application for leave to appeal to the New York Court of Appeals was denied on December 14, 1993. The order denying defendant's application was entered on the same day. *See* certified copy of Certificate Denying Leave and letter from the New York Court of Appeals, annexed hereto as A1-A2. Defendant's petition was not delivered to the Clerk of this Court until March 16, 1994.[5] Because the

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5 Defendant's petition, received by the Clerk on March 16, 1994, was returned to him, pursuant to Rule 33.7, for failure to comply with this Court's rules. *See* letter from the Clerk of the Court to defendant's counsel dated March 17, 1994, annexed hereto as A3-A4. Defendant thereafter refiled his petition on or about May 9, 1994. Although Rule 33.7 contains a tolling provision for improperly prepared documents, this provision is of no benefit to defendant because his initial filing, received by the Clerk on March

petition was delivered by United Parcel Service, a private delivery service, it was not deemed filed until actually received by the Clerk, *i.e.*, on March 16, 1994. Rules of the Supreme Court, Rule 29.2. The petition, therefore, was not filed with this Court until ninety-two days after the New York Court of Appeals entered its order denying defendant's application for leave to appeal. Accordingly, the petition was untimely.

Moreover, this Court should not excuse defendant's tardiness and review the petition in the interest of justice. *See generally Schacht v. United States*, 398 U.S. 58, 63-64 (1970). Unlike the petitioner in *Schacht*, the defendant here, who has been represented by retained counsel throughout the litigation, never moved for an extension of time to file his petition. Furthermore, in *Schacht* the defendant gave reasons for his delay, which this Court characterized as beyond the petitioner's control. In this case, by contrast, the defendant has offered no explanation for his delay. Significantly, he does not even acknowledge that his petition is untimely. Absent some showing by defendant that there are compelling reasons for this Court to overlook his tardiness, his application should be denied. *See* R. Stern & E. Gressman, *supra*, at 389.

Defendant's handling of this petition is similar to the way the appellant in *Pittsburgh Towing Company v. Mississippi Valley Barge Line Company*, 385 U.S. 32 (1966), prosecuted its appeal. In both cases there was no application to extend the time for filing the appeal or petition, neither party offered this Court a satisfactory explanation for the untimely filing, and both parties ignored the issue in their jurisdictional statement. In dismissing the appeal in

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16th, was already untimely.

Pittsburgh Towing Co., this Court stated:

> This Court has been generous in excusing errors of counsel, but if there are to be rules, there must be some limit to our willingness to overlook their violation. While we are inclined to be generous in exercising our discretion to forgive a mistake and waive the consequences of negligence, fairness to other counsel and to parties with business before the Court as well as due regard for our own procedures leads us to believe that this case does not warrant our indulgence.

385 U.S. at 32-33. In this case too, defendant's failure to comply with the rules of this Court and file his petition in a timely manner should not be excused. Defendant has offered no explanation for his delay and there are no compelling issues presented by this case that warrant review (*see* point II, *infra*). Accordingly, defendant's petition should be denied.

II. DEFENDANT'S PETITION SHOULD BE DENIED BECAUSE IT DOES NOT PRESENT THIS COURT WITH A SUBSTANTIAL FEDERAL QUESTION THAT IS EITHER NOVEL OR UNSETTLED. MOREOVER, DEFENDANT WAS NEITHER DENIED DUE PROCESS NOR DEPRIVED OF NOTICE UNDER THE FIFTH, SIXTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

Defendant argues that he was not given adequate notice prior to trial that he faced conviction under New York Vehicle and Traffic Law (hereinafter "V.T.L.") § 1192(3), notwithstanding the existence of both a well-settled body of

case law in the state and a statute, which he assails as unconstitutional, that explicitly provided the basis for the jury's consideration of that charge. Defendant's claim is completely meritless and, therefore, undeserving of this Court's review. In fact, there is no conflict of decisions concerning the issues underlying his claim nor any unsettled legal issues that need this Court's resolution in this case. *See* Rules of the Supreme Court, Rule 10; R. Stern & E. Gressman, *supra*, at 287.

New York's "drunk driving" statute, V.T.L. § 1192, sets forth three independent ways that a person may commit the generic offense of driving while under the influence of alcohol. Subdivision 1 prohibits a person from operating a motor vehicle while the person's ability is impaired by alcohol. Subdivision 2 prohibits a person from operating a motor vehicle while the person has a blood-alcohol level of .10 of one percent or more ("*per se* intoxication"). And subdivision 3 prohibits a person from operating a motor vehicle while in an intoxicated condition ("common law intoxication").[6]

By definition, these three offenses share a common purpose: to prohibit the operation of a motor vehicle by a person under the influence of alcohol. In addition, the proof establishing a person's guilt of these offenses will frequently, if not inevitably, overlap. Accordingly, recognizing the interrelationship between these three offenses, the legislature has provided that each of these offenses need not be separately alleged in an accusatory instrument. Subdivision 9 of V.T.L. § 1192 (which was designated subdivision 7 at

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[6] Subdivision 4 of this statute prohibits operating a motor vehicle while one's ability is impaired by drugs.

the time of defendant's arrest and prosecution) expressly provides that a person may be convicted of violating any of these subdivisions notwithstanding that the charge laid before the court alleges a violation of only subdivision 2 or 3.[7]

Thus, New York's statutory scheme itself makes it plain to all persons charged with violating V.T.L. § 1192(2), such as defendant, that they also face conviction under subdivision 3, provided, of course, that the evidence supports such a conviction. It, therefore, should have come as no surprise to defendant when during the trial the People sought to prove, as authorized by statute, that defendant operated a motor vehicle while his blood-alcohol level exceeded .10 of one percent (V.T.L. § 1192[2]) and that he did so while in an intoxicated condition (V.T.L. § 1192[3]) ("common law intoxication"). Moreover, prior to summations and the jury's deliberations, the court disabused defendant of any misunderstanding that he may have had concerning the law's application to his case. At its pre-charge conference, the trial court informed defendant that, in addition to submitting the V.T.L. § 1192(2) charge, it would also instruct the jury to consider whether defendant had violated subdivisions 1 (driving while impaired) and 3 ("common law intoxication") of that section. The court explained to defendant and his attorney that subdivision 7 (now subdivision 9) of section 1192 explicitly authorized the jury's consideration of these additional charges.

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[7] A charge of violating subdivision 1 alone is not enough to support a prosecution for subdivisions 2 and 3. The offense defined in subdivision 1 is a "traffic infraction," which is a less serious offense than the misdemeanors defined by subdivisions 2 and 3.

In addition to the statutory scheme, the case law in New York provided notice to defendant of his potential criminal exposure and support for the trial court's action. Nearly twenty years earlier, in *People v. Farmer*, 36 N.Y.2d 386, 330 N.E.2d 22 (1975), the state's highest court upheld as constitutional former V.T.L. § 1196 (1970 N.Y. Laws ch. 47, § 6), the earliest forerunner to V.T.L. § 1192(9). In that case, rejecting a "fair notice" challenge virtually identical to the current claim, a majority of the court held that the statute gives persons charged with subdivision 2 or 3 of section 1192 "ample notice" that they may be convicted under subdivisions 1, 2, or 3. The court reasoned that these offenses "closely overlap and are but species of the same generic offense . . . ." *Farmer*, 36 N.Y.2d at 390, 330 N.E.2d at 22-23. Thus, because the distinctions between the three specific offenses "are no greater, and indeed, are less than those involved in the charging and conviction for lesser included offenses in the criminal law," the court concluded it was not unfair to treat them as such. *Id.* at 390-91, 330 N.E.2d at 23.

Shortly after *Farmer*, the state legislature addressed the due process concerns expressed in the concurring and dissenting opinions in that case. So as to enhance the notice provided to persons accused of operating a motor vehicle while under the influence of alcohol in violation of V.T.L. § 1192, the legislature amended the law to include directly in that section the notice provision that had, until then, been situated in section 1196.[8] As a result, persons accused of

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[8] Former section 1196 was initially recodified as V.T.L. § 1192(7) -- its designation at the time of defendant's criminal conduct, arrest, and prosecution. 1988 N.Y. Laws ch. 47, § 18. It has since been redesignated as V.T.L. § 1192(9).

violating any of the alcohol-related offenses enumerated in V.T.L. § 1192, such as defendant, need only read that section to learn the extent of their possible criminal exposure.

Notwithstanding the textual proximity of these various provisions and the inextricable relationship between "*per se* intoxication" (V.T.L. § 1192[2]) and "common law intoxication" (V.T.L. § 1192[3]), defendant maintains that some additional notice was required. His claim is unsupported by logic or case law, and does not merit review. Defendant fails to cite a single case where a court has held that a statutory provision similar to V.T.L. § 1192(9) was unconstitutional on due process grounds or for any other reason. Nor has he demonstrated that there is a conflict among the states, among the federal circuit courts, or between the state and federal courts on this issue.

The Sixth Amendment right "to be informed of the nature and cause of the accusation" is incorporated within the Due Process Clause of the Fourteenth Amendment, and guarantees to all persons the right to reasonable notice of the charges and a fair opportunity to defend against them. *Cole v. Arkansas*, 333 U.S. 196 (1948); *In re Oliver*, 333 U.S. 257 (1948). The Constitution does not require, however, that all charges upon which a defendant may be convicted be specifically pleaded in the accusatory instrument. Thus, for example, the law is well settled that where all of the elements of an uncharged crime are contained within a charged offense, the defendant is deemed to have sufficient notice of the lesser included offense as well. *Paterno v. Lyons*, 334 U.S. 314, 320-22 (1949); *see also Schmuck v. United States*, 489 U.S. 705, 718 (1989) (no "fair notice"

1990 N.Y. Laws ch. 173, § 62.

violation where uncharged offenses satisfy "strict elements" test for lesser included offense doctrine); *State v. Gilman*, 673 P.2d 1085 (Idaho App. 1983) (lesser included offense doctrine is not limited to offenses less serious than offense charged).

Moreover, the "fair notice" requirements of the Constitution may be satisfied through other means even where the uncharged offense underlying the conviction is not a lesser included offense of any of the charged offenses. In *Franklin v. White*, 803 F.2d 416 (8th Cir. 1986), *cert. denied*, 481 U.S. 1020 (1987), for example, the court upheld a conviction for an uncharged crime, notwithstanding that it was not a lesser included offense of any of the charged offenses, because it was apparent that the accused had actual knowledge that he would be tried on the uncharged offense. And, in other instances, as in this case, due process can be satisfied by providing the defendants with statutory notice that they may be expected to defend against a related uncharged offense. *See Asherman v. Meachum*, 739 F. Supp 718 (D. Conn.), *aff'd*, 923 F.2d 845 (2d Cir. 1990); *cf. State v. Jeffries*, 430 N.W.2d 728, 737 (Iowa 1988).

In *Asherman*, the defendant was indicted for murder, but convicted after trial of manslaughter in the first degree. Under Connecticut's "strict elements" test for defining lesser included offenses, manslaughter in the first degree is not technically a lesser included offense of murder.[9]

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[9] Under the "strict elements test," all of the elements of the lesser included offense must be contained in the greater offense, making it impossible to commit the greater offense without first having committed the lesser offense. *See Schmuck*, 489 U.S. at 718-19. In Connecticut, manslaughter

Nevertheless, a Connecticut statute (C.G.S. § 53a-45[c]), and decisions of the Connecticut Supreme Court interpreting that statute, gave the defendant sufficient notice that, by virtue of the murder charge, he could be convicted of any lesser degree of homicide, including manslaughter in the first degree. The court concluded that "[i]n view of the plain language of [the statute] and the jurisprudence of Connecticut's highest court at the time of petitioner's indictment, trial and conviction, petitioner had constitutionally sufficient notice that he could be expected to defend against a charge [not contained in the indictment]." *Id.* at 723.

The reasoning in *Asherman* is applicable here. In neither case was the offense for which the defendant was convicted a lesser included offense of the original charge.[10] In both cases, however, there was a statute that expressly stated, and thereby afforded the defendant fair notice, that he could be convicted of the uncharged offense. Moreover, in both cases the highest court in the state had previously acknowledged and approved of the statute as a method of satisfying the "fair notice" component of due process.

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in the first degree is not technically a lesser included offense of murder because manslaughter in the first degree requires a state of mind (extreme emotional disturbance) that is not an element of murder. *See Asherman*, 739 F. Supp. at 722.

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New York, like Connecticut, uses the "strict elements" test for defining lesser included offenses. New York Criminal Procedure Law §§ 1.20(37), 300.50. Under this test, V.T.L. § 1192(3) is not a lesser included offense of § 1192(2). *See also Farmer*, 36 N.Y.2d at 393, 330 N.E.2d at 24 (Fuchsberg, J., concurring).

Indeed, there is even a stronger basis in this case than in *Asherman* to conclude that the defendant had notice of the need to defend against the charge for which he was convicted. In this case, the statutory notice provision as well as the various offenses -- charged and uncharged -- upon which defendant faced conviction were all set forth in V.T.L. § 1192. The "textual proximity" of these statutory provisions, while not dispositive, is clearly a significant factor in determining whether defendant had constitutionally sufficient notice. *United States v. Brewster*, 506 F.2d 62, 74, 75 n.32 (D.C. Cir. 1974); *see also* Blair, *Constitutional Limitations on the Lesser Included Offense Doctrine*, 21 Am. Crim. L. Rev. 445, 453 (1984). Unlike the defendant in *Asherman*, the defendant in this case did not even have to turn to another statute to learn that he was also subject to prosecution upon the charge for which he was ultimately convicted. Moreover, the statutory notice provision in the instant case is clear and unambiguous. Unlike the defendant in *Asherman* who, when charged with murder, had to determine which offenses were homicides of a lesser degree, the statute here expressly provides that "[a] driver may be convicted of a violation of subdivision one, two or three of this section notwithstanding that the charge laid before the court alleged a violation of subdivision two or three of this section . . . ." V.T.L. § 1192(9).

Defendant would also have this Court ignore the close relationship between the offense charged ("*per se* intoxication") and the offense for which he was convicted ("common law intoxication"). As the New York Court of Appeals recognized years ago in *Farmer*, where penal statutes are "logically related" (*Brewster*, 506 F.2d at 74) or, as here, "species of the [same] generic offense" (*Farmer*, 36 N.Y.2d at 390, 330 N.E.2d at 23), and are designed to remedy the same wrong, there is a greater likelihood that a defendant will be aware of the need to defend against the

uncharged offense. *cf. Asherman*, 739 F. Supp. at 723 (grouping of related offenses within statutory scheme provides notice that crime with less culpable state of mind is lesser included offense of one requiring more culpable state of mind). This is especially true in New York when a defendant is charged with a violation of V.T.L. § 1192, because evidence of a defendant's blood-alcohol level is admissible regardless of the theory of intoxication or impairment. V.T.L. § 1195(1). Likewise, evidence of "common law intoxication" (bloodshot eyes, slurred speech, etc.) is admissible to support a charge of "*per se* intoxication." *See People v. Abel*, 166 A.D.2d 841, 563 N.Y.S.2d 531 (3d Dept. 1990).

In sum, the existence of a clear statutory notice provision, coupled with the eighteen-year history of state case law applying and upholding that statutory notice provision and its predecessors (*see, e.g., People v. Kelly*, 39 N.Y.2d 1048, 355 N.E.2d 386 [1976]; *People v. Farmer*, 36 N.Y.2d 386, 330 N.E.2d 22 [1975]; *People v. Clapper*, 123 A.D.2d 484, 506 N.Y.S.2d 494 [3d Dept. 1986]; *People v. Fielder*, 78 Misc. 2d 7, 358 N.Y.S.2d 263 [Sup. Ct. App. Term 9th & 10th Jud. Dists. 1974]), was more than sufficient to afford defendant with notice of the offenses for which he ultimately could be convicted. *See Hill v. Perini*, 788 F.2d 406 (6th Cir. 1986); *Asherman*, 739 F. Supp. 718. Just as defendants are deemed to be on notice of statutes such as Fed R. Crim. P. 31(c), permitting instructions on lesser included offenses (*Brewster*, 506 F.2d at 74), so too defendants, through their attorneys, are on notice of a well-settled practice -- derived from statute, case law or both -- that permits a jury to convict based on a theory of the case that differs from the one originally pled. *Hill*, 788 F.2d 406 (state statute and well-settled practice permitted charging defendant as a principal but convicting based on accessorial-liability theory). It is apparent, therefore, that defendant's claim that he was

not provided adequate notice that he faced conviction under a "common law intoxication" theory (V.T.L. § 1192[3]) is completely meritless when examined in the light of well-settled principles of law.

Equally meritless is defendant's claim that his defense at trial was prejudiced by the court's decision to allow the jury to consider the "common law intoxication" theory. Defendant candidly admits that part of his defense was to "discredit [the] probable cause for [his] arrest." Defendant's petition at 14. That strategy necessarily entailed attacking the evidence concerning his erratic driving, the odor of alcohol on his breath, his inability to maintain his balance, his slurred speech, his bloodshot eyes, and his inability to perform two field sobriety tests -- the same evidence used to convict him of driving while intoxicated under a "common law intoxication" theory.

Moreover, it was evident from the prosecutor's opening statement that during the trial the People would be offering evidence of defendant's "common law intoxication." In his opening, the prosecutor addressed, in detail, the evidence of defendant's intoxicated condition, including the alcohol on his breath, his slurred speech, his stagger, his bloodshot eyes, and his inability to perform field sobriety tests (68). Thus, defendant's claim that he was surprised and unprepared to defend against evidence of his "common law intoxication" is belied by the record.

Accordingly, this Court should deny defendant's petition for a writ of certiorari because his claim that he was denied his right to due process and fair notice under the Fifth, Sixth and Fourteenth Amendments to the United States Constitution is completely devoid of merit. Defendant's claim to the contrary is not supported by the law and does not present this Court with any significant legal issues in need of this Court's resolution.

CONCLUSION

FOR THE FOREGOING REASONS, THE PETITION FOR A WRIT OF CERTIORARI SHOULD BE DENIED.

Respectfully submitted,

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* *Counsel of Record*
for Respondent

Dated: July 21, 1994

State of New York
Court of Appeals

BEFORE: HON. GEORGE BUNDY SMITH,
Associate Judge

THE PEOPLE OF THE STATE OF NEW YORK

Respondent,

- against -

JOHN BELSITO,

Appellant.

CERTIFICATE DENYING LEAVE

I, GEORGE BUNDY SMITH, Associate Judge of the Court of Appeals of the State of New York, do hereby certify that upon application timely made by the above-named appellant for a certificate pursuant to CPLR 460.20 and upon the record and proceedings herein,* there is no question of law presented which ought to be reviewed by the Court of Appeals and permission to appeal is hereby denied.

Dated at Albany, New York
December 14, 1993

S/George Bundy Smith
Associate Judge

Order of the Appellate Term, 9th & 10th Judicial Districts, entered November 3, 1993, affirming a judgment of the District Court, Nassau County, rendered March 1, 1992.

* Description of Order:

State of New York
Court of Appeals

Donald M. Sheraw
Clerk of the Court

Clerk's Office
Albany, New York 12207

June 20, 1994

Robert A. Schwartz, Esq.
Assistant District Attorney
Appeals Bureau
Office of the District Attorney
Nassau County
262 Old Country Road
Mineola, New York 11501-4251

Re: People v. John Belsito

Dear Mr. Schwartz:

Enclosed please find a sealed copy of Judge Smith's certificate denying permission to appeal in the above-captioned matter. Such a certificate is entered in the clerk's office on the date appearing on the face thereof.

Very truly yours,

Stuart M. Cohen
Deputy Clerk

enc.

SUPREME COURT OF THE UNITED STATES
OFFICE OF THE CLERK
WASHINGTON, DC 20543-0001

WILLIAM K. SUTER
CLERK OF THE COURT

AREA CODE 202
479-3011

March 17, 1994

Raymond G. Lavallee
33 Guy Lombardo Avenue
Freeport, NY 11520

RE: John Belsito v. New York

Dear Mr. Lavallee:

Returned are 39 copies of your petition for a writ of certiorari forward by UPS and received in this office March 16, 1994, for failure to comply with this Court's Rules of Procedure, a copy of which is enclosed. Also enclosed is a sample petition which you may follow as to form.

If you intend to pay the $300 docket fee, the petition must be presented on paper which is 6 1/8 by 9 1/4 inches as stated in Rule 33 of the Rules of this Court. All of the text must be double-spaced and may not be photoreduced. Rule 33.1.(c). The cover of the petition must bear the title of the paper. Rule 33.2.(6). The current term is the October Term 1993.

The affidavit of service must contain the name of counsel served, in addition to the address. Rule 29.

Corrected copies of the petition must be returned

promptly in order for the case to be docketed. This office will retain one copy of the petition and your check in the amount of $300, in expectation of receipt of a properly prepared petition. See Rule 33.7.

Very truly yours,

WILLIAM K. SUTER, CLERK

By

Ruth B. Jones
Assistant Clerk

Enclosures